# INDEX TO BRIEF.

# CASES CITED.

IN THE

# Supreme Court of the United States

No. 108.

JOHN E. C. ROBINSON, et al., Appellants,

vs.

JOHN E. LUNDRIGAN, Appellee.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF FOR APPELLANTS.

### STATEMENT.

On January 24, 1901, Robinson, one of the appellants, filed with the Register and Receiver of the U. S. Land Office, at Cass Lake, Minnesota, his application to enter, pursuant to the provisions of Section 2306, Rev. Stats., as assignee of James Carroll, the tract in controversy, to-wit: The southwest quarter of the southeast quarter (SW¼ of SE¼) of Section thirteen (13), Township fifty-five (55) North, Range twenty-six (26), West of the 4th P. M., said land being at that time unappropriated public land of the United States. With the application were submitted affidavits showing *prima facie* Carroll's right to an entry under said section, and his assignment thereof.

This application was noted upon the plat and tract books of the local land office, and, with the assignment and accompanying proofs, then transmitted to the general land office in accordance with the rule then in force.

March 28, 1904, the Commissioner of the General Land Office notified the land officers at Cass Lake that the proofs of Carroll's right as a beneficiary of said section 2306, Rev. Stats., were not satisfactory, and allowed Robinson to show cause why his application should not be rejected. Comp. Ex. 3, p. 33.

January 28, 1905, a hearing was directed to be had to allow Robinson an opportunity to show the validity of the Carroll right. Comp. Ex. 4, p. 34.

The hearing was accordingly ordered and notice of trial to be had June 29, 1905, was issued. (P. 34.) Robinson failed to appear or submit evidence and on July 15, 1905, the Register and Receiver rendered decision finding that Carroll, the assignor, did not possess the qualifications which would entitle him to an entry under Sec. 2306, Rev. Stats., and recommending the rejection of Robinson's application to enter. (Pp. 36-37).

July 27, 1905, within the time allowed for that purpose, Robinson filed at the local land office an appeal from the last mentioned decision, wherein he asked that he be allowed thirty days within which to "re-scrip" the land, and that the decision of the Register and Receiver be amended so as to grant him a reasonable time within which to perfect his entry. (Pp. 38-39).

August 29, 1905, the Commissioner of the General Land Office, directed said land officers to notify Robinson that he was allowed thirty days from notice within which to file a proper substitute for the additional homestead right of Carroll. (Pp. 39-40).

October 4, 1905, within the time allowed, Robinson filed such substitute, to-wit: The assigned additional homestead right of Justus F. Heath. (P. 42).

February 15, 1906, the Commissioner of the General Land office accepted this substitute and directed the allowance of entry upon the payment of the legal fees and commissions. (P. 43).

March 2, 1906, Robinson paid said fees and commissions and final certificate of entry, No. 715, Cass Lake, Minn., series, was issued to him. (P. 44).

July 11, 1905, after the date of the hearing at which Robinson failed to appear, and prior to the decision of the Register and Receiver of July 15, 1905, the Santa Fe Pacific Railroad company, by John E. Lundrigan, attorney-in-fact, applied to select the same land under the act of June 4, 1897, commonly known as the "Forest Reserve" act. This application was noted upon the tract book of the land office, with the memorandum "Subject to S. A. App." (Ex. 1, p. 37—Paster between pages 30 and 31).

Upon the issuance of the final certificate to Robinson, the local land officers rejected the application of the railroad company, which appealed from their action.

June 14, 1906, the Commissioner of the General Land Office rendered a decision upon said appeal, holding that the company's application to select constituted an intervening adverse claim and a bar to the substitution made by Robinson, basing said decision upon one rendered by the Honorable Secretary of the Interior, March 26, 1906, in the case of Maginnis, assignee of Davis. (Comp. Ex. 23, pp. 53-54). He accordingly held for cancellation the final certificate issued to Robinson. (Comp. Ex. 17, pp. 44-45-46).

February 25, 1907, upon appeal by Robinson, the Secretary of the Interior affirmed said last mentioned decision (Comp. Ex. 18, pp. 46-47), and March 18, 1907, denied a motion for review. (Comp. Ex. 19, pp. 48-49).

May 18, 1907, in accordance with said decision of the Secretary, the Commissioner of the General Land Office, canceled Robinson's entry. (Comp. Ex. 20, pp. 49-50).

July 15, 1907, petition for re-review by Flanigan, a grantee of Robinson, and one of the appellants, was denied by the Secretary. (Comp. Ex. 21, pp. 50-51).

July 20, 1908, the patent of the United States was issued to said Santa Fe Pacific Railroad company for the tract applied for and entered by Robinson. (Comp. Ex. 22, p. 52-53).

Thereupon, to-wit: November 9, 1908, appellants filed their bill of complaint against said railroad company and John E. Lundrigan in the United States circuit court for the District of Minnesota, Fifth Division, alleging the matters hereinabove recited. It was further alleged that the decision of the Secretary of the Interior was contrary to law, and was due to a mistake or misconstruction of law in this, that the land in question was not at any time freed from appropriation by Robinson's application of January 24, 1901, and was not at any time thereafter subject to selection by any other person or corporation.

The bill further alleged that prior to March 24, 1906, and on and prior to January 24, 1901, there was in force in the Department of the Interior, a rule and regulation, and a settled practice, providing and declaring that, upon the rejection of a soldier's additional homestead right, surrendered by an assignee thereof in support of an application to make entry of public land under sec. 2306, Rev. Stats., such applicant might substitute in support of his application a valid additional homestead right in lieu thereof, and that no right attached by virtue of any application made for land embraced in the prior application of another until such first application was disposed of. It was further alleged that but for the aforesaid misconstruction of law, and ignoring and violation of the rule, practice and decisions of the department, the application of the railroad company to select would have been held to be invalid and ineffectual because the land was embraced in and subject to the prior application of Robinson, and that Robinson was in law and fact entitled to receive the patent of the United States therefor.

The answer of defendant, Londrigan, admitting most of the allegations of complainants' bill, denies that Robinson on July 27, 1905, filed an application for leave to substitute for the invalid homestead right of Carroll, but admits that he filed an application to be allowed thirty days within which to "re-scrip" the land.

It denies that the decisions of the Secretary of the Interior referred to were contrary to law, or were due to mistake or misconstruction of the law applicable to such cases, and alleges that said decisions were in accordance with the statutes of the United States, and with the decisions and rules of the Department of the Interior.

It alleges that under the law, and under the rules and decisions of the department, the application of the railroad company became effective to take and enter said land upon the rejection of Robinson's application as assignee of Carroll.

It denies that under the law or under the rules of the department, Robinson, upn the rejection of his application as assignee of Carroll, had the right to re-scrip the land or to substitute another and valid additional homestead right therefor, so as to adversely affect the intervening right obtained by the railroad company, and alleges that the privilege to Robinson to substitute was subject to any valid adverse application pending at the time the application for the location of the additional right of Carroll was rejected.

It admits there was a rule and practice prevailing prior to January 24, 1906, that upon the rejection of a soldier's additional homestead right to make entry, the applicant might apply for and enter the land with another valid additional right, but alleges that such rule and practice was limited to those cases where no other adverse right was pending at the time such substitution was offered.

After due hearing the decree of the circuit court, entered September 8, 1909, was that complainants' bill be

dismissed, and adjudging that defendant, Lundrigan, was the owner in fee simple of the land described in the bill, free and clear of any right, claim or demand upon the part of complainants.

Complainants duly appealed from said decree to the United States Circuit Court of Appeals for the Eighth Circuit. That court affirmed the decree of the lower court in an opinion filed March 23, 1910 (Record, p. 81). A dissenting opinion was filed by Mr. Sanborn, Circuit Judge, (Record, p. 88).

In support of their appeal to this court from the decree of the Circuit Court of Appeals, appellants filed the following

## SPECIFICATIONS OF ERROR.

1. That said court erred in directing and entering a decree in said cause in favor of the appellee, John E. Lundrigan, and against the appellants, John E. C. Robinson, John Beakfelt, George A. Fay, and D. C. Finnegan, and awarding to said appellee the costs in said cause.

2. That said Court erred in not directing and entering a decree in favor of said appellants, and against said appellee.

3. That said Court erred in its decree that the said appellants have no right, title or interest in and to the land described in the bill of complaint herein, to-wit:

The Southwest quarter of the Southeast quarter (SW¼ of SE¼) of Section Thirteen (13) in Township Fifty-five (55) North, Range Twenty-six (26) West of the Fourth Principal Meridian, located in the County of Itasca, State of Minnesota.

4. That said Court erred in its decree that the appellee, John E. Lundrigan, is the owner of the fee simple of the above described premises, free and clear of any right, claim or demand upon the part of appellants, or any of them.

5. That said Court erred in not deciding that appellants are the equitable owners of the above described premises, and that said appellee holds the legal title thereof as trustee for said appellants.

6. That said Court erred in not ordering, adjudging and decreeing that said appellee, John E. Landrigan, should convey the legal title to said described premises to the appellants, as prayed for in the bill of complaint herein.

7. That said Court erred in not finding and deciding that the application of appellant, John E. C. Robinson, made January 24, 1901, to enter said described premises under the provisions of section 2306, R. S., as assignee of one James Carroll, segregated the same and removed it from liability to ther disposal during the pendency of said application.

8. That said Court erred in not deciding that the substitution by said appellant, John E. C. Robinson, of the soldier's additional homestead right of one Justus F. Heath, for that of James Carroll on October 4, 1905, related to and became effective as of the date of said Robinson's application to enter, made January 24, 1901, to the exclusion of all other applications made subsequent thereto.

9. That said Court erred in not finding and deciding that said substitution was made by authority of the Land Department of the United States.

10. That said Court erred in not finding and deciding that said substitution was made and allowed in accordance with the rule, regulations and settled practice of said Land Department in force at the time thereof, as well as (at) the date of said appellants' application of January 24, 1901.

11. That said Court erred in not finding and deciding that said rule, regulation and settled practice of the Land Department constituted a rule of property, under which the rights of appellants rested.

12. That said Court erred in not deciding that the said Land Department had no authority to disturb rights acquired in accordance with the rules, regulations and settled practice in force at the time, by the retroactive application of a different rule and regulation subsequently adopted.

13. That said Court erred in not finding and deciding that the issuance of the patent of the United States to the Santa Fe Railroad Company was in derogation of the prior rights of appellant, John E. C. Robinson and his assigns, and operated to vest in said patentee and its assigns the legal title to the described premises as trustee for the appellants.

14. That said Court erred in not reversing the judgment and decree of the Circuit Court of the United States for the District of Minnesota, Fifth Division, and in not finding and decreeing judgment and decree in favor of the appellants.

## ARGUMENT.

It clearly appears from the facts recited in the statement, as to which there is no dispute, that when Robinson in January, 1901, applied for the tract of land in controversy it was unappropriated public land of the United States open to disposal and free from any adverse claim or right. It further appears that the application of the Santa Fe Company was tendered while the rights of Robinson were in course of adjudication by the Land Department; that it was merely recorded and noted upon the tract book at the land office as being subject to Robinson's application; that the Commissioner of the General Land Office recognized Robinson's prior right in consequence of which final certificate of entry was issued to him, and the application of the railroad company rejected. It was upon an appeal from this rejection that the Land Department reversed its former action; canceled the final certificate issued to Robinson, and issued patent to the railroad company.

The questions, therefore, presented by this record for final determination are:

1. Did the Land Department authorize the substitution by Robinson of a valid soldier's right for that of Carroll?

2. If so, was such authorization pursuant to a rule, regulation and settled practice in force at the time?

3. Was the adoption of such a rule within the power of the Land Department?

I.

Before the expiration of the time within which Robinson was allowed to appeal from the decision of the register and receiver finding that Carroll was not entitled to a soldier's right of entry under section 2306 R. S., he filed what he termed an appeal, asking to be given thirty days within which to "re-scrip" said above mentioned tract, "and that the decision of the register and receiver be amended so as to give (him) a reasonable time within which to perfect said entry." (Comp. Ex. 10, p. 38.) This was not a petition to make a new application for the land, for which no request or authority was necessary because such an application would have been received and noted upon the records when offered subject to intervening rights, if any. It was, as its language shows, a petition to perfect his application by the substitution of another soldier's right for the one which was found objectionable.

The Commissioner of the General Land Office so understood it, and granted the petition. He directed the local land offices, under date of August 29, 1905, to "notify the applicant that he will be allowed thirty days from notice hereof in which to file a *proper* substitute for the *right* hereby rejected." He further instructed those officers that "if at the expiration of the said period the applicant has not filed such substitute" * * "to hold the said tract subject to entry from that time by the first qualified applicant." Ex. 11, pp. 39-40.

This action of the Land Department is clear and unmistakable as to its effect and purpose. In directing that Robinson be required to file a proper substitute within a certain time, it recognized his right, if duly exercised to do so, and in directing that the land be subject to entry after the limited time, upon failure of Robinson to act, it recognized as an existing fact, under the law and regulations as applied to such cases, that Robinson's application preserved his rights from intrusion by subsequent applicants; and that he only was to be considered until a final determination with respect thereto should have been reached. This decision, or more properly these instructions of the Commissioner of the General Land Office, addressed to the register and receiver at St. Cloud, Minn., forcibly answers the first question submitted in the affirmative.

II.

Robinson, on October 4, 1905, having surrendered assignment and proofs of the soldier's right of Justus F. Heath, it was transmitted to the General Land Office, where action was had under date of February 15, 1906. (Corrp. Ex. 15, p. 43). In his letter of that date the Commissioner said "this application is a substitute for another for the same land which has been finally closed," and directed issuance of original and final receipts and final certificate of entry after payment of the legal fees and commissions.

This action, together with that which authorized the substitution to be made, show that such was the settled practice in like cases. The language of the letters shows that the word "substitution" was used to indicate a recognized and accepted proceeding.

The application of the Railroad Company, filed July 11, 1906, was junior to that of Robinson, which was still pending and in course of adjudication. A junior applicant, the Land Department has held consistently acquires no right until the first application is disposed of; that such

disposition is a matter lying solely between the first applicant and the government, and that the only right acquired by a junior applicant is that of being preferred over other applicants after him, should the first application be finally rejected.

Jerry Watkins, 17 L. D. 148.

Berry v. Towner, 21 L. D. 434.

In the case of the California and Oregon Land Co. the Secretary of the Interior held that a pending school selection invalid for want of proper base, was nevertheless a bar to other entry. He said:

> "Such practice to prevent interference with matters pending before the land department for determination of rights in controversy between the United States and persons seeking under the law to appropriate public land, would manifestly greatly prejudice public interests in economical administration, and also greatly injure those seeking to appropriate public lands by delays due to vexatious claims of right founded upon some supposed defect in the proceedings of the first applicant. The evils of such practice would be intolerable." 33 L. D. 595, p. 598.

It was not, therefore, incumbent upon the Land Department in reaching a final determination respecting Robinson's application to inquire whether there was or was not a junior application on file. That inquiry would only have become necessary had it been finally rejected. That Robinson's application to enter was finally rejected when the soldier's additional right of Carroll was declared invalid is the contention of appellee, seemingly concurred in by the court below, but this position loses sight of the fact that Robinson *before* his application was finally rejected, applied for, and was granted, leave to substitute. In making such substitution he need not have filed with it a new application to enter, and that he did so in no manner abridged his right under his original application. It was simply superfluous and unnecessary.

A homestead entry of public land, no matter upon what false affidavits it may be founded is, so long as it

remains of record, an absolute segregation of the land embraced in it.

Germania Iron Co. v. James, 89 Fed. 811.

Hastings & Dakota R. R. Co. v. Whitney, 132 U. S. 357.

McMichael v. Murphy, 197 U. S. 304.

A soldier's additional homestead entry under the original regulations for the administration of the law (Sec. 2306 R. S.) was in like manner an absolute segregation. It was first provided by the Land Department that an applicant for entry under Sec. 2306 should apply to the proper local land office, make affidavit that he had performed the necessary military service, and had prior to June 22, 1874, made an original homestead entry of less than 160 acres, whereupon his entry, not exceeding in quantity an area which, with his original entry, would equal 160 acres, such proofs being satisfactory to the local land officers, should be allowed. General Circular June 17, 1875. (Copp's Public Land Laws, Ed. 1876, p. 186.)

In May, 1877, it was required that parties claiming to be entitled to such rights should present their proofs to the Commissioner of the General Land Office, when, if found satisfactory, they would be returned to the party with a certificate, recognizing his right to make entry.

Copp's Public Land Laws, Ed. 1882, pp. 478-9.

This regulation, which did not contemplate an application for any specific tract of land in advance of the certification of the right, was revoked by circular instructions of February 12, 1883, and claimants were again required to appear at the local land office, subscribe to an affidavit showing their qualifications and apply for and make entry in the same effect as in case of an original homestead.

1 L. D. 554.

In 1890 a different procedure was adopted, but from the time instructions were first issued in 1875, until this

with the exception of the period between 1877 and 1889, soldiers' additional entries were made and allowed at the local land offices upon application and affidavits then presented in the same manner and to the same effect as entries under the general homestead law. If such an entry should have been procured by means of false affidavits its segregative effect was nevertheless the same as that of any other entry, and it could be removed only by cancellation in the regular manner.

On February 18, 1890, new instructions were issued and were in force until 1908. They were in force when Robinson's application was tendered, and when he was allowed to substitute another additional homestead right for the one first tendered. They were as follows:

> "Where parties apply to make entries under Section 2306, United States Revised Statutes, claiming by virtue of service in the army or navy of the United States during the late civil war, and of having made a homestead entry for less than 160 acres, prior to the 22nd of June, 1874, and the right claimed is not certified by this office, after examination, under circular of May 17, 1877, and the certificate presented to you in support of the claim, I have to direct that before taking final action on the claim you forward the papers to this office for examination in connection with the official records, after making the notations on your records necessary to show the pendancy of the application, and the consequent segregation of the land, so as to prevent any adverse appropriation before the application is finally acted upon, and await further instructions before taking any further action in the case."

Reprinted in General Circular of 1904, p. 238.

Sierra Lumber Co., 30 L. D. 547, p. 549.

In thus providing that the application when noted upon the records should operate to segregate the land applied for during the time it was pending, the instructions in actual effect went no further than those which they superseded, because, as has been shown, under the earlier instructions the application when based upon affidavits

satisfactory to the register and receiver was allowed as an entry and consequent segregation of the land.

Prior to 1896, the Land Department held the soldiers' additional right to be personal, not assignable, but in that year this court construed the law differently and held that there was no restraint upon the power of alienation. It said, quoting from the opinion of the Circuit Court of Appeals, in Barnes v. Poirier, 57 Fed. 956,

> "The presumption is that Congress intended to make this right as valuable as possible," and that "its real value was measured by the price that could be obtained by its sale."
>
> Luther v. Webster, 163 U. S. 331, p. 341.

In administering the law, as thus construed, the Department has in no manner safe-guarded a purchaser from fraud and deception. He buys in the open market, an assignment of the National homestead right, accompanied by such ex-parte affidavits hereinbefore referred to as sufficient for the making of an entry, and these with his application for a specific tract of land are filed at the local land office, for formal action as specified in the instructions of 1890 (supra). If upon the examination therein provided for, it is found that the claimed right is invalid or insufficiently established, the assignee applicant has no protection in his right to the land desired unless it is provided by those instructions, and by the right to substitute another right in aid of his application.

This matter of "substitution" was not a new thing in the Land Department, but had its origin in the administration of the law regarding the location of military bounty land warrants. Bounty land warrants were issued after proof of the soldier's right thereto first presented to the proper governmental bureau, and in this respect a purchaser had the advantage over the purchaser of a soldier's additional homestead right. Such warrants when tendered for location and received, operated to segregate the land the same as an entry, but were sometimes found to be invalid, or improperly assigned. In such cases the innocent

purchaser and locator was protected by the following rule, viz:

> "When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon the party in interest may procure the issue of a patent by filing in the office for the district in which the land is situated an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or other kind of scrip legally applicable to the class of lands embraced in the entry."
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> Rule 41, Circular of July 20, 1875, cited in
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> Hussman vs. Berry, 6 L. D. 375, and in
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> Hussman vs. Durham, 165 U. S., 144.

The Secretary of the Interior, in the case of Robeson T. White, decided June 9, 1900, stated the rule as it has been unquestionably for very many years that in case of a "private entry on location of a land warrant, scrip, or payment of money, and it transpired that innocently a forged warrant, or scrip or counterfeit money was paid, the entryman would be allowed to substitute other good warrant scrip or money, without prejudice to his entry." He then added:

> "Since it has been decided that soldiers' additional rights are simply property, and have lost their personal character, the additional right, as it has reference to acquirement of government land, has as a logical consequence, become similar in character to a land warrant, scrip or money. It is simply a form of legal consideration to the government for the title to the land entered. It is not of the substance of the transaction that one right or another right, one piece of scrip or another piece of like scrip, be surrendered as the consideration for the entry, so only as a legal consideration some valid additional right is surrendered."
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> 30 L. D. 61, p. 63.

In the case of John C. Ferguson, decided by the Secretary of the Interior October 14, 1904, (unreported) it

appears from the statement that McBean presented an application to enter under Sec. 2306, as assignee of one Ellis. The commissioner rejected the application for the reason that the service of Ellis was insufficient as a basis on which to found such additional right. McBean appealed, and pending action thereon Ferguson applied for the same land. The register of the land office rejected the latter application, and this action was affirmed by the General Land Office, upon authority of the instructions of 1890. The rejection of McBean's application was affirmed on appeal by the Secretary. It does not appear that McBean offered to substitute a valid right for that of Ellis. The Secretary held that the most McBean's application can be held to have done, was to protect any right that he might have as against other applicants, or that it was equivalent to an entry only so far as his rights were concerned, and that therefore there was no good reason why the application of Ferguson should not have been held to await that of McBean.

Comp. Ex. 27, pp. 60-61.

This decision does not go so far as to hold that McBean could not have protected himself by an offer to substitute. Nor does it hold that the intervening applicant acquired any right to be considered until McBean's application was disposed of. It modified the former instructions to the extent of permitting junior application to be received subject to final action upon the senior. This was made clear in the letter of the Commissioner of the General Land Office dated February 8, 1905, in response to the inquiries of the land officers at Duluth, Minnesota, as to the effect of the Ferguson decision. He said:

"With respect to your next question:

"'Where a person who has a pending soldiers' additional application for a tract of land becomes convinced that the right or 'scrip' is bad, applies to substitute another piece of the same kind of scrip, to-wit: soldiers' additional, should we receive and transmit such scrip or reject it.'

"The answer to this question is provided for in the case of Robeson T. White (30 L. D. 64), where it was held in effect that an applicant under section 2306, R. S., may after due notice that a soldiers' additional right, upon which his application is based, is for any reason illegal or invalid, substitute another soldier's right as a basis for his original application, without waiving any rights acquired by virtue of such application."

He then proceeded to state that a new application need not be filed with the substituted base; that the filing of a substituted base, within the time allowed, is all that is required to protect the applicant's rights under his original application, and that should the applicant fail to file such substituted base in due time, the case would be closed, and the land open to settlement by the first qualified applicant.

Comp. Ex. 28, pp. 62-63.

In the case of Wilson F. Pleas, decided October 18, 1906, it appeared that Pleas applied, as assignee, to enter under section 2306, Revised Statutes. A junior application was made by the Aztec Land & Cattle company under act of June 4, 1897. Upon examination of the additional homestead right offered by Pleas the General Land Office required certain evidence to be furnished. Pleas appealed to the Secretary of the Interior, then withdrew his appeal, and offered a selection under Act of June 4, 1897.

It was held:

"In the decision appealed from it was held that by failing to substitute a valid soldier's right of additional entry in place of the alleged right derived from Boster, Pleas lost all rights acquired under his original application. This view is in harmony with the unreported departmental decision of October 11, 1904, in the case of John C. Ferguson.

"In the case before us, when the offered base proved invalid and no like valid base was supplied, the said com-

pany's lieu selection right attached and became superior to Pleas' right under the lieu selection which he subsequently offered as a substitute, not being entitled to consideration as a substitute, and adverse rights having intervened, his said lieu selection was properly rejected."

38 L. D., 226, p. 227.

It will be observed that this decision awarding the land to the junior applicant is not based upon the proposition that Pleas had not the right to substitute a valid additional right, but that he did not apply to substitute *in kind*, and that his application to select under act of June 4, 1897, not being in aid of his original application was subordinate to the application to select previously made by the Aztec Land & Cattle company. This ruling is in accord with the instructions of February 8, 1905 (Comp. Exhibit 28, p. 72), where it is held (p. 74) "there is no decision or ruling known to this office by which any rights obtained under original applications can be maintained by the substitution of any other than scrip of the same character as that upon which the original application is based."

As late as June 16, 1910, the Secretary of the Interior held in the case of a junior application that it, "as matter of administration could not be, and was not, allowed because of the pending application of Smith, which had not at that time received consideration * * upon its merits," and that

While the land department was not bound to allow the proffered substitution, it undoubtedly had, and still has, the right to do so, and there would seem to be no good or sufficient reason why this should not be done.

Emerson D. Smith, assignee, v. Robert L. Whitehead, unreported. Copy of the entire decision is herewith submitted as an appendix.

This decision was vacated and set aside on authority of the decision of the Circuit Court of Appeals in the present case.

Further evidence of the practice of the Land Department, in the matter of substitutions, and its construction of the decisions in the White and Ferguson cases, is furnished by the decision of the Commissioner of the Land Office, rendered July 10, 1905, in the case of Maginnis, assignee of Davis. He said, referring to the application for time within which to substitute, and to an objection thereto, by counsel for the Northern Pacific Ry. Co., claiming an intervening right,

> "In the case of Robeson T. White, 30 L. D. 61, it is held in effect that an applicant under Sec. 2306, R. S., after due notice that a soldier's additional homestead right, upon which his application is based, is for any reason illegal or invalid, may substitute another soldier's additional homestead right as a basis for his original application without waiving any rights acquired by virtue of such original application.
>
> In accordance with the case of Robeson T. White, supra, and the case of John C. Ferguson (Secretary's decision of Oct. 14, 1904—unreported), the application of Maginnis serves to protect his rights as against other applicants until such time as the case is closed upon the records of this office, and the tender of the selection of the Northern Pacific Ry. Co., for said tract can confer no right upon the company as against this applicant, but serves to protect it against others."

Comp. Ex. No. 23, pp. 53-54.

In reversing this decision the Secretary called attention to the fact that from the time the Maginnis application was suspended in April 7, 1904, he took no action in the matter, either by applying for a hearing with a view to establishing the validity of said right within the time allowed him therefor, or by the substitution of another right, until May 10, 1905, more than a year after such suspension. He then said:

"The original application by Maginnis failed. While it was pending it barred the allowance of another claim

for the same land, and the proffered selection by the railway company was rightly held to await final action thereon, but when the first application failed, the selection took precedence over a second application by Maginnis after such selection."

Comp. Ex. 24, pp. 55-56.

This case is to be distinguished from the present one by the fact that Robinson applied for leave to substitute, within the time within which he could appeal from the decision of the local officers, and it is a fair conclusion from the statement that had Maginnis taken like timely action, instead of sleeping on his rights, the decision would have allowed the substitution. But if it be different, and this decision is construed to hold that an intervening application becomes effective upon the failure of the additional homestead right tendered with the prior application, it marked a change in the rule, regulation, practice and decisions which had preceded it, and should not have controlled the action of the Department in respect of rights which had their inception prior thereto.

In his decision on petition for re-review in the Maginnis case, rendered Sept. 7, 1906, the Secretary cites the Ferguson decision as authority for the rule that an application to enter land under Sec. 2306 stands or falls by the character of the additional right tendered with it. He said:

> "This ruling was long prior to the proffer of the indemnity selection by the railway company and the substituted application by Maginnis. It clearly outlines the rule of administration in the disposition of soldiers' additional homestead applications and all subsequent applications prior to the allowance of the additional. In the absence of an intervening application there can be no question but that the substitution of another application might be allowed at any time but it cannot be assumed that with the presentation of a soldiers' additional application there is carried a right, in the event the application fails, to substitute another. The substituted application is in

reality a new application and no rights are gained thereunder because of any prior application."

Comp. Ex. 26, pp. 58-59-60.

The action in the Robinson case was founded upon the foregoing decision.

Comp. Ex. 18, p. 46.

Comp. Ex. 19, pp. 48-49.

Comp. Ex. 21, pp. 50-51.

It is confidently submitted that until the decision in the Maginnis case there was no intimation in any of the instructions, regulations or decisions that a substitution was in effect a new application for the land desired, but that on the contrary it was a proceeding in strict analogy to and harmony with the practice authorized in such cases as the Secretary referred to in the Robeson T. White case. The term "substitution" cannot possibly be construed to mean a new and separate application taking effect when tendered, since to substitute means to replace one thing by another, and the citations we have made show conclusively that the Land Department until the decision in the Maginnis case, used the term in that sense alone.

It is advanced in opposition to appellants' contention that the facts of the White case did not involve the question of substitution. To this a very lucid answer is made by Judge Sanborn in his dissenting opinion, and for ourselves we are unable to see or appreciate the distinction made in the majority opinion of the court that one having a preference right of entry under the act of May 14, 1880, is in any better position than any other applicant for public land. Any application for land open to disposal involves a preference over subsequent applications, and the only essential difference in cases arising under that act is that there is a practical reservation of the land for the period of thirty days in the interest of the successful contestant. To preserve his rights, it is just as necessary that he should within that period show himself qualified to make the entry, as it would be for any other applicant.

McGee et al v. Ortley et al, 14 L. D. 323; Wyatt v. Wells, 25 L. D. 311. If he applies under Sec. 2306 as the assignee of a soldier's additional right, his application either must be held to be susceptible of perfection by substitution, should the tendered soldier's right be found to be invalid, in accordance with the ruling in the White case, or else it must be held to fail absolutely as ruled in the Maginnis case.

However, it is unnecessary for us to discuss this point farther. The fact is, as has already been shown, that the Land Department, following the White decision, did authorise substitutions, and that the practice prevailed until the decision in the Maginnis case.

Regarding the Ferguson case it is not mentioned in any of the decisions as establishing the rule that an application to enter under Sec. 2306, R. S., cannot be perfected by substitution, until the decision of Sept. 7, 1906, upon petition for re-review in the Maginnis case. Prior to that time the Department construed it as going no further than to permit junior applications to go upon record subject to final determination of the rights of the first applicant, including the right of substitution.

Instructions of February 8, 1905. Comp. Ex. 28, p. 62.

Decision of General Land Office July 19, 1905. Comp. Ex. 28, p. 53.

As stated by Judge Sanborn, page 94:

"The decisions and declarations which have now been recited constitute all the evidence that was produced in this case upon the issue of the prevailing rule and practice on October 4, 1905, when Robinson filed his substituted additional and secured his right to this land." He continued:

"They seem to me to demonstrate the fact that the rule and practice that an original application might be supported by a substituted additional homestead right and that such an application so supported gave to the applicant a preference right to enter the land over a junior applicant who presented his appli

cution before the substitution had been declared and followed in every case and instruction in which the question had arisen for more than five years prior to October 4, 1905, and there had been no decision, declaration, instruction or suggestion to the contrary."

III.

The opinion of the Court of Appeals cites the act of March 3, 1893, c. 208, 27 Stat. 593 (U. S. Comp. St. 1901, p. 1416), and holds that under this statute the Department has no power to make a rule which would cut off the right of an adverse claimant. This act was followed by that of Aug. 18, 1894, (28 Stats. 397) and was construed by the Department as intended to afford larger relief than that of March 3, 1893.

John M. Rankin, 21 L. D., 404.

Robords v. Lakey et al, 24 L. D. 291, pp. 294-5.

These acts arose from the practice that prevailed from 1877 to 1883, requiring that proofs of claimed additional homestead rights should be first presented to the Commissioner of the General Land Office, when if found satisfactory they would be returned to the party with a certificate recognizing his right to make entry. Such rights are known and designated as "certified rights." During this period also, and prior to the decision of this court in the case of Webster v. Luther (supra) the additional homestead right was held to be personal and not subject to assignment.

Paulson v. Owens, 15 L. D. 114.

Instructions February 12, 1883. 1 L. D. 654.

Nevertheless they had been commercially bought and sold in good faith, in reliance upon the certificate as evidence of the right itself and of the legal power of the holder to sell the same.

"In some cases it has been found that certificates were erroneously issued; that at the time of

the issuance thereof the soldier was not entitled to enter additional land as set forth therein. In such cases the soldier * * may have entered land and disposed of his right thereto to innocent purchasers, relying on the certificates of rights issued by this office; in other cases certificates of right had been secured through the presentation of spurious and fraudulent papers, and these have passed into the hands of innocent purchasers. The provisions of the act of March 3, 1893, seem to fully cover these classes of cases, and afford relief to purchasers thereof such as they are equitably entitled to."

Report of Commissioner of the General Land Office to Senate Committee on Public Lands, quoted in case of John M. Rankin, 24 L. D. 404, p. 406.

It thus appears that the act of March 3, 1893, enlarged by the act of August 18, 1894, was for the purpose of confirming entries in the hands of innocent purchasers, where such entries were invalid either because the additional right itself was fraudulent, or when, under the then rulings of the Department, the entry was invalid because of a sale of the right.

As has been shown the application to enter land with one of these certified rights, if the land were open to disposal, became an entry and segregation. If for any reason the application when tendered, was suspended or rejected, its subsequent allowance would depend upon the final decision as to the status of the land at that time, and should it be found that when the additional homestead application was tendered there was no prior claim, and the land itself was open to entry, it is evident that there could be no subsequent "adverse claim" sufficient to except such entry or application to enter from the provisions of the act of March 3, 1893.

Further, in many cases, such entries had been canceled for one of the invalidities specified, and subsequent to such cancellation the land entered had been settled upon or applied for by some other person. From this situa-

tion it is clear that the "adverse claims" referred to in the confirmatory act must have been either

a. Claims which had their inception prior to entry or application to enter.

b. Claims which had their inception after the final rejection of the application or cancellation of the entry.

A confirmatory act of congress is the equivalent of a new grant; and the act of March 3, 1893, would have operated as such to the extinguishment of inchoate rights had they not been specifically preserved. An instance of adverse claim asserted by settlement subsequent to the entry upon land embraced in an alleged void additional entry, is found in the case of Oliver v. Thomas et al. 5. L. D. 289.

In another case "the many entries, relinquishments, contests, protests and appeals" were stated to serve more to mystify than to enlighten. Among the entries allowed were certain additional homesteads. It was decided that a prior application of one Mrs. Stanton should have been allowed by relation, after denial of a claimed preference right by another. The secretary then said:

> "This cut off all subsequent claims, including the soldier's additional entries * * * presented March 8, 1890, by C. W. Riner, as attorney-in-fact for Young, Brown and Mayer. It is clear that had these soldiers gone in person to the land office and had been allowed to make these entries in their own proper persons, it could not have served to defeat the prior rights of Mrs. Stanton, based upon a departmental decision of her right of entry. It follows, therefore, that the recent act of congress approved August 18, 1894, which only purported to validate soldier's additional homestead certificates, in the hands of bona fide purchasers for value, cannot be invoked to defeat rights which accrued prior to its passage."
>
> Stanton et al. v. Constantine, 19 L. D. 160, p. 163.

In another case reinstatement of a canceled additional entry and confirmation under act of August 18, 1894,

was denied for the reason that prior to said act a contestant's preference right of entry had intervened. The secretary said:

> "The intent of the act of August 14, 1894, was to afford relief to those who had violated the law; but surely it did not contemplate the spoliation of one whose only offense was that he had spent his time and money in reliance upon the good faith of the government."

Mee v. Hughart et al. 20 L. D. 2, p. 3.

In the case of Raymond et al. v. Redifer's Heirs, et al it was held that a transient occupancy of land as a mining camp, where no steps were taken to assert a legal right did not bar confirmation of an additional entry under the act of 1894. The question decided was whether the land was properly subject to homestead entry at the date said entry was made.

21 L. D. 228.

We submit that the proposition that a claim asserted to land entered or applied for, which had its inception during the time that the entry was intact, or the application to enter was still pending, cannot be held to be an adverse claim within the meaning of the confirmatory acts of March 3, 1893, and August 18, 1894, from which it follows that those acts have no bearing upon or application to the question presented in this case.

The court of appeals also calls attention to the fact that the circular of February 18, 1890, makes no reference to the right of substitution, but the reason it gives for that omission is not the right one. At that date, and until the assignability of additional rights was affirmed by this court in 1896, substitution was not possible. The additional right was considered by the Department to be personal. The applicant was the soldier, or alleged soldier, himself. If his claim was not valid, he could not perfect his application by offering the right of another. Moreover, he could scarcely be said to be entitled to any consideration since his application must have been

founded upon affidavits made by him and known to be false. But that circular did protect all rights until final rejection of the application, and it served also to protect the rights of applicants to enter with assigned claims, and with more reason, if possible, because such applicants were depending upon the asserted rights of others as to which they had no means of ascertaining the falsity. If the additional homestead right was to be made available to the soldier by its sale, and to the applicant by its use, he must have of necessity purchased the assignment thereof, in reliance upon the proofs accompanying it. The Department afforded no protection by prior ascertainment of the validity of the additional homestead right, and the least it could do was to protect the right to the land applied for, as was done by the decision in the White case, and subsequent practice thereunder.

It cannot be denied that the Secretary of the Interior had the power to prescribe the rules and regulations under which the provisions of the additional homestead law should be cried into effect, and that he exercised that power from time to time, in prescribing how the right should be used, and in modifying and amending such first instructions as experience seemed to require. He first authorized the entry to be allowed, and the land consequently segregated in much the same manner as original homesteads, upon application and affidavits of qualification. It was then provided that the right to an additional entry should first be determined by the Land Department, and certified, after which upon application entry was allowed. This method having also proved unsatisfactory, practically the original method was in 1885, restored. In 1890, the procedure was again amended to that under which the application of appellant was made, providing that certificates of entry should not be issued until the right should have been examined and found valid by the General Land Office. Surely, if, and it is not denied, the Secretary had power to authorise a segregation of the land by entry as under the first regulations

adopted, he had power also to provide for a segregation of the land by the regulation of 1890, until he should have finally disposed of the rights of the applicant. At least so far as the rights of the applicants as against third parties were concerned. And when the decision in the case of Webster v. Luther introduced a new element into the law, he must have had power to meet the changed condition by suitable regulations which would recognize the fact that the applicant to enter, in most cases, was applying in right of another with whose qualifications he could not be acquainted except by means of such affidavits as were offered.

The authority of the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, to enforce and carry into execution by appropriate regulations every portion of the Revised Statutes relating to the public lands, is conferred by Sections 441, 453 and 2478.

The mode in which the supervision of the public lands shall be exercised in the absence of statutory directions may be prescribed by such rules and regulations as the Secretary may adopt.

The general words of these sections are not supposed to particularize every minute duty devolving upon him. There must be some latitude for construction. In the language of Knight v. Land Association, 142 U. S. 161, pp. 178-181:

> "It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated and which are therefore not provided for by express statute, may sometimes arise, and therefore, that the Secretary of the Interior is given that superintending and supervising power, which will enable him, in the face of these unexpected contingencies, to do justice."

Williams v. U. S. 138 U. S. 514, p. 524;
See also Cuba v. U. S., 152 U. S. 211, p. 221.
Cosmos Co. v. Gray Eagle Co. 190 U. S. 301.
Roughton v. Knight, 219 U. S. 537.

In the light of the history of the additional homestead law, and its administration, are not the claims of applicants as assignees of its beneficiaries "matters not foreseen" and do they not present "equities not anticipated"?

Neither the regulation of 1890, or the practice of substitution authorized by the White decision is opposed by any statute of the United States, but both are consistent with the fair and proper administration of section 2306 of the Rev. Stats. They were intended to, and did protect the rights of the first applicant for land subject to disposal, without injury to the United States, or to any citizen. While extending such protection, they do not authorize or permit the unlawful disposal of the public lands, for they provide that an additional homestead right surrendered with the application found upon subsequent investigation to be invalid, shall be replaced by a valid one, as for many years previously had been the rule with respect to military bounty land warrants and other scrip. They do not invade the rights or equities of a junior applicant, who may seek to acquire the land because he does so with notice that the land department holds it to be segregated by the prior application, and that his junior application gives him no right other than to be preferred in the purchase of the land over such applicants as might come after him.

In this particular case the application of the railroad company to select was made with notice that it was subject to the soldiers' additional homestead application of Robinson, and with consequent notice of all the rights that he had under the regulations and decisions of the land department.

The federal courts have been prompt in such cases as this to protect the equities of the prior applicant.

"But whilst * * * no vested right as against the United States is acquired until all the pre-requisites for the acquisition of title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acqui-

sition of the land when the United States have determined to sell or donate their property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be first in right."

Shepley v. Cowan, et al., 91 U. S. 330, p. 338.
Sturr v. Beck, 133 U. S. 541, citing;
Witherspoon v. Duncan, 4 Wall 210, p. 218;
Chotard v. Pope, 12 Wheat, 586, 588;
Hastings & Dakota R. R. Co. v. Whitney, 132 U. S., 357, p. 366.

In the case of U. S. v. Detroit Timber Co., this court said:

"But while until the issue of the patent the land is under the control of the Land Department, which, upon proper investigation and for sufficient reasons, may set aside the certificate of entry, yet this power of the Land Department cannot arbitrarily be exercised, without notice to the entryman, and if improperly exercised the rights of the entryman may be enforced in the courts after the patent has issued to other parties."

200 U. S. 321, pp. 337-338.

And that: "In passing upon transactions between the government and its vendeers we must bear in mind the general principles of equity and determine rights upon those principles except as they are limited by special statutory provisions."

Ib. p. 339.

In every material respect the case of Robinson is worthy of and entitled to the application of the principles enumerated in this case and the other cited cases.

It is not necessary, for the purpose of this case, to dispute the power of the Secretary to adopt the rule announced in March, 1906, in the Maginnis case. All that we are concerned with here is the retroactive application of that rule to rights that had vested prior to its adoption under the operation of a different rule.

Even the Land Department, if we except the Maginnis case, has consistently recognized and applied the principle that rights acquired in conformity with rules and regulations in force at the time are protected from the effects of any subsequent change of rule. Upon this point we cite:

Oliver vs. Thomas, 5 L. D. 289;

Sandy D. Bullock, 37 L. D. 23;

J. B. Weaver, 35 L. D. 553;

Oliver vs. Bates, 36 L. D. 423, p. 427.

In the case of Oliver v. Thomas, Mr. Justice Lamar, then Secretary of the Interior, said:

> "The Thomas entry, therefore, having been made and allowed under the rulings then in force, and not being in conflict with the law as then interpreted, should be allowed to stand. The entryman complied with all the regulations of the Department in the matter of his entry and he should not be prejudiced now, because those regulations have been changed. 1 Kent's Com., 476; Brown v. United States, (113 U. S. 568) and cited cases." 5. L. D. 289, p. 292.

In the case of Germania Iron Co. v. James, 89 Fed. 811, the question was whether a rule of the land department, that after cancelation of an illegal entry of public land, such land should not be open to disposal to others until notice of cancelation was received at the proper land office, could be modified and changed by the Secretary of the Interior, to the detriment of applicants who made their applications in conformity with that rule, and prior to such modification or change. The court, among other things, said:

> The rule and practice here under consideration stands upon higher ground than the ordinary rules for the mere conduct of proceedings in courts. They condition the inception, the foundation, the very existence of all rights and titles to this land. Rights initiated in accordance with them become vested interests in property, and attempts to establish rights

in violation of them were as though they had not been. They had become an established rule of property upon which men relied and had the right to rely. The maxim *stare decisus, et non quieto movere*, applies nowhere more universally or with more salutary effect than to those rules and that practice under which property is acquired and secured. It is often far more important that these should be certain and changeless, than that they should be right. * * *

Nor was it within the supervisory power of the Secretary or of the Commissioner to set aside or annul rights acquired under this rule and practice * * * by a retroactive decision * * * to the effect that the established rule or practice when he made his entry was either inconvenient or erroneous. They might undoubtedly have made and promulgated a new rule which would govern cases arising after a new rule of practice had been made and had become known. (P. 817).

To the same effect is cited Howe v. Parker, 190 Fed. 738, p. 757.

If, as we contend, it has been shown that the issuance of the final certificate of entry to Robinson, in accordance with the directions of the commissioner's letter of August 29, 1905, was authorized by the established rule and practice of the land department, then this case is governed by the principle of *stace decisus* as announced in the Germanian Iron company case, and in the decisions of the Land Department, and cases therein cited.

We, therefore, submit that the cancelation of Robinson's entry, and the issuance of the patent of the United States for the same land to another, was erroneous, and exceeded the power of the Commissioner of the General Land Office and the Secretary of the Interior; that the equitable title of Robinson and his grantees was not divested by that action, and that appellants should be granted the relief prayed for in their bill of complaint.

Very respectfully,

C. D. O'BRIEN and
P. H. SEYMOUR,
Solicitors for and of Counsel with Appellant.

245058
B
S. E. H.

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington, D. C.

January 13, 1911.

I hereby certify that the annexed copy of Departmental Decision of June 16, 1910, is a true and literal exemplification from the original on file in this office with Roswell Serial No. 012085.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. A. FENGARD,
Recorder of the General Land Office.

M. L. 245038—1

K. M. T. G. B. G.
G. B. E.

DEPARTMENT OF THE INTERIOR
Washington

Jun 16 1910

Address only
The Secretary of the Interior

E-1794.
1795.

| | |
|---|---|
| Emerson D. Smith, assignee of heirs of Jesse Shewmake and heirs of James Shaffer v. Robert L. Whitehead. | Review—Department decision recalled and vacated—Reversed—Roswell, New Mexico 03220. |

Revived Jun 13 1910 G. L. O.

The Commissioner of the
General Land Office.

Sir:

This is a duly entertained motion on behalf of Emerson D. Smith for review of departmental decision of November 30, 1909, not reported, which affirmed without discussion your office decision of August 4, 1909, denying his application to enter under section 2306 of the Revised Statutes the N.½ of the NW.¼, Sec. 13, T. 2 N., R. 35 E., Roswell land district, New Mexico.

The pertinent facts are as follows:

August 5, 1905, one James Ticer made homestead entry of this and other land, and about September 11, 1908, the said Emerson D. Smith purchased for a cash consideration of $2500 Ticer's relinquishment of the eighty acres above described, and on that day filed such relinquishment in the local land office, together with his application under section 2306 of the Revised Statutes to enter the

land, based on original homestead entry of one James Shewmake at Little Rock, Arkansas. This additional right under the rule governing procedure in such cases was forwarded by the local officers to your office, where, upon examination, it was found to be invalid for reasons stated in your office decision of April 28, 1909.

It did not appear, was not, and is not claimed that Smith had any knowledge, information, or belief that the additional right so proffered by him was defective for any cause. He did not appeal from your said office decision, but on June 2, 1909, within the time allowed him for such appeal, he filed in your office his application to substitute for the right so adjudged to be invalid, the soldiers' additional right of one James Shaffer, supported by due proof of the ownership of such right.

In the meantime, however, on February 6, 1909, your office had inadvertently and erroneously held Smith's application for rejection because the land applied for appeared to be subject to the Ticer entry, his relinquishment not being noted, and on February 16, 1909, four days after such inadvertent and erroneous decision, Robert L. Whitehead filed his homestead application for said land in the local land office. Your said office decision of August 4, 1909, and said departmental decision or November 30, 1909, now under review, sustain the claim of Whitehead and deny Smith's proffer of substitution.

Upon a more careful consideration of this case it is now thought that these decisions work injustice clearly within the power of the Secretary of the Interior to correct.

It is said that this land has a value, apart from its use as a homestead, for townsite purposes, and it is frankly admited on behalf of Smith that he is attempting to secure title to the same for such purposes, it being urged as the basis of his claim, the equitable consideration that he and another, to whom he is under contractual obligations with reference to the land, have spent in attempting to acquire title thereto for townsite exploitation, more than $3000.

Whitehead alleged no settlement right or claim or other equity which entitles him to special consideration, and under the orderly procedure of the land department his application as matter of administration could not be, and was not, allowed because of the pending application of Smith, which had not at that time received consideration by your office upon its merits.

While the land department was not bound to allow the proffered substitution, it undoubtedly had, and still has, the right to do so, and there would seem to be no good or sufficient reason why this should not be done. The large amount of money which Smith expended, his good faith in a legitimate undertaking, his prompt offer of valid consideration to the government, and the utter absence of counter equitable considerations, strongly appeal for the relief which the land department indisputably has the right to extend.

Departmental decision of November 30, 1909, is hereby recalled and vacated, and your office decision of August 4, 1909, is reversed, and the case remanded for proceedings not inconsistent with this decision.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

INDEX

# SUPREME COURT

## OF THE

# UNITED STATES

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## OCTOBER TERM 1912

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**NO. 108**

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JOHN E. C. ROBINSON, Et Al,

Appellants,

vs.

JOHN R. LUNDRIGAN,

Appellee.

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## BRIEF FOR APPELLEE

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### ARGUMENT

#### Statement of Appellee's Position.

A patent for the land involved in this action was issued to the Santa Fe Pacific Railroad Company on the 20th day of July, 1908. (Record, p. 22).

On the 18th day of November, 1908, the said company conveyed the said premises to the appellee, John E. Lundrigan. (Record, p. 23).

The complainants commenced this action against the said railroad company and the appellee, herein, to have it declared that the title was held in trust, and inured to the benefit of the appellants.

The said railroad company appeared and filed a disclaimer, alleging that it had conveyed all its right, title and interest in and to said premises to the appellee, J. E. Lundrigan, and the action has been continued against him alone.

The appellants contend that the patent should have been issued to J. E. Robinson, one of the appellants, by virtue of a soldier's additional homestead application, and that the Land Department erred in rejecting said application and in allowing the entry of said railroad company, under the provisions of the Act of June 4, 1897.

Robinson, as assignee of James Carroll, applied to enter said land, under Section 2306, R. S., in 1901.

In 1904, Robinson was ruled to show cause why his application should not be rejected because of the invalidity of the soldier's additional right which he had tendered, and a hearing on said order to show cause was ordered to be held in June, 1905. Robinson made no appearance at the hearing and, on July 15, 1905, the local officers recommended that the application be rejected on the ground that it appeared from the evidence taken at the hearing that the James Carroll, who had assigned to Robinson, was not the James Carroll who had made the original homestead entry on which the additional right was based. (See Bill of Complaint, fol. 2 and also fol. 18).

On July 25, 1905, Robinson made an application to the Commissioner of the General Land Office, which he labels an appeal, but in which he says:

"Appellant is deeply sensible and appreciates the seriousness of defaulting at said hearing, *and does not ask that the case be reopened.* This appeal is not taken for the purpose of hindering or delaying the adjustment of long drawn out matters, but with the hope and urgent request, that under the circumstances, appellant be given thirty days within which to *rescrip* said above mentioned tract." (Record, p. 14).

On August 29, 1905, the Commissioner, in response to Robinson's application to rescrip, advised the local officers, in reference to their recommendation for the rejection of Robinson's application, as follows:

"Your said decision is accordingly affirmed and the said application is rejected *and the case closed.* You will so note on your records. You will also notify the applicant that he will be allowed 30 days from notice hereof in which to file a proper substitute for the right hereby rejected." (Record, p 16).

On October 4th, 1905, Robinson filed the additional homestead right of Justus F. Heath, which upon examination was found to be a valid right, and in March, 1906, a final receipt was issued to him.

On July 11, 1905, more than six weeks prior to the time when Robinson made his application to be allowed the privilege of rescriping the land, the Santa Fe Railroad Company applied to enter said land, under the provisions of the Act of June 4, 1897, and the said application was allowed, and noted on the records, subject to the final disposi-

tion of the soldier's additional application of Robinson, as assignee of James Carroll. (Complainants' Ex. No. 1, p. 30).

At the time the final receipt was issued to Robinson, as assignee of the Justus F. Heath right, the application of the railroad company was rejected as being in conflict therewith, with the right to appeal from said decision.

The railroad company had not been a party to any of the proceedings in the Department, regarding the investigation of the validity of the James Carroll right, or the subsequent location and allowance of the Justus F. Heath right, so far as appears from the record, and the first notice the company had of the proceedings was at the time when it was notified of its right to appeal from the decision of the department allowing the entry under the Heath application, and rejecting the application of the railroad company, as being in conflict therewith.

The railroad company promptly appealed and, on June 14, 1906, the Commissioner of the General Land Office rendered his decision cancelling the entry, under the Heath application, and allowing the application of the railroad company. (Record, p. 17).

The grounds upon which the Commissioner based his decision were, that, at the time Robinson applied to file the substituted right, the application of the railroad company had already been offered, received and was held subject to the final disposition of Robinson's application under the James Carroll right; and that when that right failed and was rejected the railroad company's

application took precedence over the second application of Robinson, which was made subsequent to the railroad company's application. (Record, p. 17).

On February 25, 1907, Secretary Hitchcock affirmed this decision of the Commissioner. (Record, p. 18).

On a motion for review, Secretary Garfield affirmed the former decisions. (Record, p. 20).

On a motion for re-review, Acting Secretary Woodruff reaffirmed the former holdings. (Record, p. 21).

Thus it will be seen that the Commissioner of the General Land Office, and three different secretaries have, after elaborate and exhaustive arguments, and after mature deliberation and consideration, rejected the contentions made by the appellants in this action. And it is further to be observed that the Land Department has been upheld by the Circuit Court and the Circuit Court of Appeals.

The sole and only question involved in this case is this: Is a person who applies to enter public land, with an invalid soldier's additional right, entitled, after his invalid application has been rejected, to a grant of additional time to obtain valid scrip with which to enter said land, where a valid application for said land has been allowed and is pending at the time the holder of the invalid right applies for such additional time?

The appellants contend that an applicant, under an absolutely void soldier's additional right, is entitled to an additional grant of time within which to obtain a valid right, notwithstanding the

fact that, at the time the original applicant's right was rejected as invalid, another valid application for the land is pending.

The appellants base their contention, solely, upon the ground, that the right to additional time, under such circumstances, had been established by the custom and practice of the Department.

The appellee, on the other hand, contends:

First, that no such custom or practice was in force.

Second, that even if such a custom and practice was in force, and had been adopted and recognized by the Department, that it was contrary to law, and no legal rights could be obtained under such custom and practice.

We contend that, even if it be conceded that there was an established custom, in the Department, granting additional time to an applicant for public land to substitute valid for invalid scrip, that the granting of such right, *where it conflicted with the adverse rights of other qualified applicants,* would be an enlargement of, and an addition to, the terms of the statute, by the Department, and that such a practice would be beyond the powers of the Department.

## PART I.

### NO SUCH CUSTOM WAS IN FORCE.

It will be noticed that the appellants, nowhere in their brief, maintain that the right to a grant of additional time to obtain valid soldier's additional scrip to substitute for invalid scrip, where a valid adverse application is pending, is confered by the statute itself, but they rest their contention entirely upon the custom and practice alleged to have been in force in the Department.

It is incumbent upon the appellants, therefore, to clearly show that such a custom prevailed.

The only proof upon which the appellants rely to establish the custom of the right to substitute a valid soldier's additional right for an invalid one is the case of Robeson T. White, 30 L. D., 61, and the Land Office Circular of February 18, 1890.

Neither the circular nor the case cited bear out appellant's contention.

In the White case the applicant applied to enter certain land with a soldier's additional certificate. Afterwards, believing that there were certain defects in the first piece of scrip offered, he tendered another soldier's additional certificate, but did not abandon or withdraw the filing of the first piece of scrip.

Prior to White's second application, another party applied for the land, and a contest arose between the two applicants, the second applicant contending that the offer of the second piece of scrip by White was an abandonment of the application made under the first piece and that his rights attached prior to the time the second piece was offered.

But the Department held that White had never abandoned his first application, and as it turned out that the first piece of scrip was *not* defective White was allowed to take the land.

On page 63, the Secretary says: "It does not appear that White at any time withdrew, abandoned, or receded from his original application to enter."

Again, on the same page he says: "But the facts tend to show that the first right offered to be located was perfectly valid."

Again, on page 64, he says: "There is nothing in the record to show that he has waived any right he acquired by his first application under the Carver right."

The distinction between the White case and the case at bar is perfectly manifest.

In the case at bar, Robinson's first application, after a formal hearing in the Department for the very purpose of determining the validity of the Carroll scrip, was rejected and the Commissioner directed the local officers to so "note it upon the records."

In the White case, no hearing was ever had as to the validity of his first application and the

application was never rejected by the Department.

White simply became fearful that there was some defect in the first application, and without any hearing, and without withdrawing or abandoning his first application, and, as a matter of precaution, he tendered a second application.

But the Department held that his mistake as to the validity of the first application could not affect his legal rights under it, so long as there was no formal withdrawal of it, and so long as it still stood as an application upon the records.

Furthermore, the decision in the White case did not turn upon the question of the right to substitute a valid for an invalid right.

White had instituted a contest against a prior entry and had been successful. Under the laws of the United States, a successful contestant is given a preferred right of entry over other applicants.

White's right to the land, therefore, was by virtue of his successful contest. The soldier's additional right which he tendered was merely in aid of his right as a successful contestant. In other words, he had a right to the land *independent* of the application under the soldier's additional right, and if that failed he had the right to take it in any other lawful way.

But, in the case of Robinson, his right depended solely and alone upon the soldier's additional right of James Carroll, and as this right was invalid, Robinson's application was invalid.

On page 64. in the White case, the Secretary says:

"The intention to claim benefit of and attempt to exercise his preference right, earned by his successful contest of McCrimmon's entry, was the essential part of the transaction. In what manner or by what consideration the government should be satisfied for the land was only matter of incident to the essential and principal thing—*the exercise of his preference right of entry.*"

We contend, therefore, that the White case does not support the appellants in their contention that a custom was in force in the Department which permitted the substitution of a valid soldier's additional right for an invalid one.

The only other piece of evidence which the appellants offer that a custom prevailed in the Department permitting an applicant to substitute a valid soldier's additional right for an invalid one, where it conflicted with an adverse application is the Land Office Circular of February 18, 1890.

This circular will be found on page 67 of the record.

This circular simply directed the local land officers that where parties apply to make entries with *uncertified* soldier's additional scrip, "that before taking final action on the claim you forward the papers to this office for examination in connection with the official records, after making the notations on your records necessary to show the pendency of the application, and the consequent segregation of the land, so as to prevent any adverse appropriation before the application is finally acted upon, and await further instructions before taking any further action in the case."

What is there in this circular to warrant the assumption that a party who had applied for public land, with an invalid soldier's additional right, would be given the right to substitute valid scrip, where it conflicted with an adverse application?

The question of the right to locate a second piece of scrip, where the first location is found to be invalid, is not mentioned, or even remotely suggested.

The circular simply directs that, where an application for land is made with uncertified soldier's additional scrip, the application should be noted on the records so as "to show the pendency of the application," and that the scrip be forwarded to the General Land Office for examination, and that the local officers should await instructions "before taking any further action in the case."

Nothing is said as to what the status of the applicant will be in case it is found that his application must be rejected by reason of the fact that his scrip is invalid.

As we have said before, the appellants do not rely upon the statute for the right to substitute valid for invalid scrip.

They have not cited, and cannot cite, a single provision of the statute which gives such right, either expressly, or impliedly.

They rest their contention to this right of substitution, solely and exclusively, upon a custom and practice in force in the Department.

Now the question as to whether or not a certain custom and practice was in force in the Department is a pure question of *fact*.

Where a party relies upon an asserted custom or practice, for the exercise of a right, he must show clearly, positively and affirmatively that such a custom or practice exists *in fact*.

In such cases, it is not sufficient merely to show that such custom *would* be a reasonable one, or that it *would* not be in violation of law, if adopted, but it must be shown, affirmatively, that such a custom and practice has prevailed.

The right, in such cases, does not inhere in the law, but rests upon the fact that a definite course of procedure has been adopted, recognized and maintained, that the party asserting the right has relied, and had a right to rely, upon the custom, and that it would be inequitable to deprive him of the benefit of such custom, after he had relied and acted upon it.

It follows from this that, unless the party asserting the right clearly shows that such a custom has prevailed, there is no foundation for the assertion of the right at all.

There are only two things upon which appellants rely to establish the so-called custom of permitting valid soldier's additional scrip to be substituted for invalid scrip, where the substitution would conflict with an adverse application, and these are the Land Office Circular of February 18, 1890, and the case of Robeson T. White, *supra*.

But, as we have shown, the circular does not consider, or even refer to, the question of the right of substitution, and, consequently, could not be relied upon as affirmative proof of this alleged custom, and, in the case of White, the Department held that the *first* application was a valid one, that

it never had been abandoned, or withdrawn, and further held, and *decided* the case upon the point, that White's status before the Department, and his right to the land, was to be determined, not by the question as to whether or not he had the right to substitute valid for invalid scrip, but by the fact that he was *the successful contestant of a former entry.*

The appellants, therefore, are left without any proof that such a custom was in force, and as they rely, solely, upon the existence of such a custom there is no basis for the assertion of the right for which they contend.

As further evidence of the fact that such a custom and practice was not in force, we cite the following decisions rendered by the Department itself.

Case of Charles P. Maginnis, Commissioner's decision. (Record, p. 53).

Case of Charles P. Maginnis, Secretary's decision overruling the Commissioner. (Record, p. 55).

Case of Charles P. Maginnis, Secretary's decision on motion for review. (Record, p. 57).

Case of Charles P. Maginnis, Secretary's decision on motion for rereview. (Record, p. 58).

Case of John C. Ferguson, Secretary's decision. (Record, p. 60).

Case of J. E. C. Robinson, Commissioner's decision. (Record, p. 44).

Case of J. E. C. Robinson, Secretary's decision. (Record, p. 46).

Case of J. E. C. Robinson, Secretary's decision for review. (Record, p. 48).

Case of J. E. C. Robinson, Secretary's decision on motion for rereview. (Record, p. 50).

In the case of Charles P. Maginnis, *supra,* the Commissioner granted the applicant the right to substitute a valid soldier's additional right for an invalid one, where a valid, adverse application was pending, and he cited the case of Robeson T. White, *supra,* as authority for his action.

But his action was reversed by the three, several decisions of the Secretaries noted above, and Maginnis was denied the right of substitution.

Counsel for appellants say that there is a distinction between the Maginnis case and the case at bar, in this, that Maginnis made his application to substitute valid scrip too late.

But the trouble with this attempted distinction is that the Department did not base its decision on the ground that Maginnis was too late in making his application, but upon the ground that the right of substitution could not be allowed when a valid, adverse application was pending, at the time the offer to substitute was made.

In the first decision by the Secretary, in this case, on page 56 of the record, he says: "Such substitution could not be allowed in the face of the intervening adverse right of the railway company. The original application of Maginnis failed. While it was pending it barred the allowance of another claim for the same land, and the proffered selection by the railway company was rightly held to await final action thereon, but, when the *first* application failed, the selection took precedence

over a second application by Maginnis, *filed after such selection.*"

And, in the decision on the motion for rereview, the Secretary on page 60 of the record, says: "An intervening application clearly bars the right of substitution, *and for that reason* the previous decisions of this Department in this case were correct."

We shall not take the time to review all the cases cited above, at length, on the question that the Department itself has held that no such custom was in force, but commend a careful reading of them to the court.

It will be found that they fully meet all of the questions raised in the case at bar, that they considered the Robeson T. White case, *Supra,* so strongly relied upon by the appellants, and emphatically assert that no such custom has ever prevailed in the Department.

We understand, of course, that the decisions rendered, by the Department are not binding upon the courts, upon questions of law, but only upon questions of fact.

Neither would we maintain that the decisions by the Department as to whether a certain custom had prevailed therein would be binding upon the courts, in the same sense, and to the same extent, as a finding by the Department that a homesteader had not complied with the provisions of the law as to settlement and cultivation of his land, but we do contend that the deliberate and reiterated decisions of a half a dozen different Secretaries on the question as to whether a particular custom and practice has been in force in

the Department is entitled to great consideration and should be deemed almost persuasive, especially as it is in regard to matters within their personal knowledge, and concerning which they have better opportunities for being advised than anyone else.

We have cited the above cases for the purpose of showing that the Department itself has held that no such custom has ever prevailed. But, even if we are mistaken as to the legal effect of these decisions, it could not aid the appellants in their contention.

In order for them to prevail in this action, they must *affirmatively* show that such custom was in force, and it certainly cannot be claimed that either the Maginnis case, the Ferguson case, or the White case hold that an applicant for public land, under a soldier's additional right, can substitute a valid piece of scrip for one held to be invalid, where an adverse application for the land is pending, at the time the offer to substitute is made.

In the Court below, counsel for appellants contended that the "*principle*" of substitution has been recognized in the cases of State School Indemnity selections and Military Bounty Land Warrants, and from this they argued that the "principle of substitution" ought to be applied to soldier's additional homestead rights.

The first and best answer to this argument is, that the right to the benefit of a particular custom, or usage, claimed to exist in a particular matter, is never gained on *principle*, or by analogy, by showing that such custom, or usage, obtains,

as to some other matter, or thing, but the right can only be obtained by showing that the custom, or usage, claimed to exist, has been adopted with reference to the *particular* matter, or thing under which the right is asserted.

In other words, the right to the benefit of a particular custom, or usage, cannot be obtained on *principle*, or by analogy, but only on *practice*.

Counsel's argument amounts to this, that because the Department had allowed the right of substitution in the cases of State School Indemnity selection and Military land warrants, that, therefore, one locating soldier's additional scrip would have the right to infer that the same *principle* of substitution would be applied to the latter.

But a particular custom cannot be established on "principle," nor can it be shown to exist by argument, inference, or implication, *but only by a long continued series of definite acts and transactions.*

If the Department were called upon to construe the terms of some statute and held that it applied to state school indemnity selections and military land warrants, then, on *principle*, the same construction would have to be applied to soldier's additional rights, if the latter came within the reason of the rule of construction adopted.

But the right growing out of a statute are *obligatory*, and must be given to all who fall within its terms.

The adoption of a particular custom, or usage, however, is not obligatory, but *voluntary*.

If it is obligatory upon the Department to

grant the right of substitution, because the right is conferred by the statute itself, then the appellants do not need to rely upon the custom, but can fall back upon the law.

If the adoption of the custom by the Department is not obligatory, but voluntary, then it is no proof that the custom has been adopted with reference to soldier's additional rights, because it has been adopted as to state school indemnity selections and military land warrants.

Neither can it be argued that the custom *ought* to be adopted in the one case, because it has been in the other, for the adoption of a particular custom, or usage, as we have seen, is voluntary and not a matter of compulsion, and the whole question is not whether a particular custom *might* have been adopted, or *ought* to have been adopted, but whether it *has* been adopted.

The question might arise as to whether a particular custom was in force among bankers. It would clearly be incompetent and of no avail to show that such a custom was in force among brokers and was applicable to bankers, because on principle and on reason the custom was as adaptable to bankers as to brokers.

It would be a sufficient answer to show that the custom had never been adopted by bankers, and the question as to whether the same *reasons* existed for its adoption by bankers as by brokers could not be taken into consideration in determining the question whether the custom was, as a matter of fact, in force among bankers.

The question as to whether a particular custom is in force is a question of *fact*, and not of *principle*.

We contend, therefore, that the fact that the right of substitution was allowed in the cases of state school indemnity selections and military land warrants, does not have any bearing on the question as to whether such a custom was in force as to soldier's additional rights.

Furthermore, there is a plain distinction between the two classes of cases and there are good and sufficient reasons why the right of substitution should be granted in the one case, and denied in the other.

In the case of state indemnity land selections and military land warrants the applications for land, under the law, amounted to *entries*, and were an absolute *segragation* of the land from the public domain.

It has been uniformly held by the Land Department that no one else can gain any right thereto while an *entry* is in force.

In the case of John C. Ferguson, *supra*, the Secretary says: "The Department has uniformly held that an entry of the public lands segregates them and no other disposition can be made thereof so long as that entry is in existence, and therefore that any application to make entry, pending during the existence of the enry, must be rejected *and no rghts are acquired thereby.*" (Record, p. 61).

But in the case of the location of *uncertified* soldier's additional scrip, the location was merely

an *application*, and not an entry, and such an application did not segregate the land so as to prevent others from making subsequent applications and obtaining rights thereto.

In the case of John C. Ferguson, *supra*, one, McBean, had located uncertified soldier's additional scrip. While McBean's application was still in force, Ferguson applied to make homestead entry on the same land and his application was denied by the Commissioner because he held that under the provisions of the Land Office Circular of February 18, 1890, (being the same circular relied upon by appellants in this case as giving them the right of substitution) McBean's application amounted to a segregation of the land so as to prevent any further application therefor.

On appeal, the Secretary reversed the Commissioner, and held that McBean's application did not amount to a segregation, and that Ferguson's application should be received and held to await the disposition of McBean's application.

The Secretary says: "Since the case of Stewart vs. Peterson (28 L. D. 515), the Department has held that any application presented during the existence of an entry of record must be rejected outright, and that no rights can be recognized as having been acquired by the presentation of an application to enter at such time. But the case at bar is different. There was no entry of the tract described and there is none now. McBean presented an application to enter. It was forwarded to your office for consideration and there rejected. His application was simply tentative and the most that it can be held to have done, as has often

been decided, was to protect any rights that he might have as against other applicants, or, in other words used in the books, it was equivalent to an entry only so far as his rights were concerned. Therefore, there is no good reason apparent why the application of Ferguson should not have been held to await that of McBean." (Record, p. 61).

Now it is perfectly apparent why the right of substitution might be given in the cases of state indemnity school land selections and military land warrants, and denied in the case of soldier's additional rights.

In the former cases the applications amounted to entries and absolutelysegregated the land, and the Department holds that, in such cases, no other applications could be made therefor, or rights obtained thereto.

Consequently, in such a case, if the government saw fit to accept a relinquishment of the original right, under which the entry was made, and permit the land to be taken under some substituted right, the transaction concerned no one but the government and the entryman, and no one would be injured thereby, for, at the time of the substitution *there were no intervening or adverse rights to be affected.*

But, in the case of uncertified soldier's additional rights, as we have seen, the location did not amount to an entry, or segregation and, in such cases, other persons were allowed to make subsequent applications for the land, and would gain a preference right to an entry, in case the soldier's additional application should be rejected.

The allowance of the right of substitution, in such case, therefore, would interfere with and affect adverse rights, *existing* at the time of substitution.

This distinction was recognized by the Department in the case of Charles P. Maginnis, *supra*. In that case, speaking of the right of substitution, the Secretary says: "The difference between the two cases is clearly defined in the departmental decisions. An indemnity school land selection, when accepted, and while of record, is held to bar the receipt of any subsequent application until the selection has been formally cancelled. With regard to soldier's additional homestead applications the same is received by the local officers and forwarded without action to the Commissioner of the General Land Office and during its pendency in this condition, that is before it is finally allowed or rejected, other applications for the land may be received and held subject to the final action upon such application." (Record, p. 59).

That Military Bounty Land Warrants fall within the same class as State School Indemnity Land Selections, is made apparent by an admission of counsel for appellants, on page 12 of their brief, in the court below, where they say:

"These decisions of the courts placed the additional homestead right upon the same level with Military Bounty Land Warrants. *There is this difference, however,* that in the case of the latter, the right of a claimant to a warrant is established by proofs submitted to the Interior Department, *prior to its location.*"

In other words, the Military Bounty Land Warrants are examined by the Department, and their validity certified to, prior to location. The location, therefore, constitutes an entry and a segregation of the land, the same as in the State School Indemnity Land selections, and bars the right of application for the land by any one else.

But in the case of uncertified soldier's additional rights, as we have seen, the location amounts to a mere application, until examined and approved by the General Land Office, and does not bar the right of subsequent application by other parties.

The arguments advanced by the Department, in the cases last above referred to show not only that the custom of substitution had not been adopted as to soldier's additional rights, as a matter of fact, but they further show that there were good and sufficient reasons why such custom *should not* be adopted, for the permissal of such a custom would interfere with, and adversely affect, intervening rights already existing and recognized by the Department.

We contend, therefore, that the appellants have not shown that a custom existed in the Department of allowing an applicant, under a soldier's additional right, to substitute a valid for an invalid right, when, at the time of substitution, a valid, adverse application for the land was pending; that the Land Office Circular of February 18, 1890, and the case of Robeson T. White, *supra*, the only pieces of evidence which the appellants have brought forward to establish this custom, do not bear out their contention, and that the De-

partment has distinctly so decided, on numerous occasions; that the fact that the custom of substitution was in force in the cases of State School Indemnity Land selections and Military Bounty Land Warrants cannot be considered as proof of the fact that a similar custom existed as to soldier's additional rights, but such custom as to the latter class must be established by independent and positive proof; that there is a plain distinction between these two classes of cases, and the distinction has been recognized by the Department, and that the reasons given for the distinction show not only that no such custom has ever been adopted, with reference to soldier's additional rights, but further show that such a custom ought not to be adopted.

As the appellants rest their whole contention upon the existence of this alleged custom, we might desist from further argument. But we propose to go one step further and show that the Department had no power to establish such a custom, and that its adoption would lead to absurd and inequitable results.

## PART II.

### THE DEPARTMENT HAD NO POWER TO ADOPT SUCH A CUSTOM.

Not only has the Department refused to sanction such a practice as is contended for by the appellants, but it would be beyond the power of the Department to grant such a right.

Jurisdiction is conferred upon the Department to *administer* the public land laws, but Congress is the body that creates all rights relating to the public domain, and the Department has no power to either add to or diminish the rights conferred by Congress.

The soldier's additional homestead right was created by Section 2306 of the Revised Statutes, and reads as follows:

"Every person entitled, under the provisions of twenty-three hundred and four to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

This statute provides that every person who is "*entitled*" to enter a homestead under the provisions of Sec. 2304, shall have the benefit of this right. The requirement of the statute is positive that the party claiming the right must be *entitled* to enter a homestead under the provisions of Sec. 2304.

The Department found that the James Carroll named in the scrip which Robinson tendered had not rendered any military service and was *not* entitled to exercise the right, consequently, the application of Robinson was utterly inffectual for any purpose.

If Robinson had tendered a certificate of election to some office no one would contend that he, thereby, gained or initiated any right to the land in question. But he could gain just as much right to the land by the tender of such an instrument, as by the tender of a soldier's additional right which was absolutely void.

It is a contradiction in terms and a manifest absurdity to assert that a party can initiate any *right* to enter public land, by the tender of an instrument to which no *rights* can attach.

But appellants say that, while Robinson did not gain any right to the land by virtue of the invalid scrip of James Carroll itself, that, as he tendered it in good faith, believing the scrip to be genuine, he had the right, under the custom claimed by the appellants to have been established by the Department, to a grant of further time within which to substitute valid scrip.

But the trouble with this contention is that there is no warrant for it in the statute. The satute does not permit public lands to be bestowed upon individuals as a gift, or arbitrarily. It is only by the exercise of some right given by the statute that these lands can be obtained.

Furthermore, this right to take the land must exist at the time the land is applied for. The initiation of a right to take public lands cannot be

based upon *good faith,* but depends upon *qualifications,* prescribed by law, and existing at the time the application is made.

In the case of every class of public lands, the qualifications that must be possessed by the applicant to enable him to make entry thereunder are prescribed by the statute itself, and the Department has no power to add to or diminish these qualifications.

In the case of the soldier's additional homestead right, the statute prescribes that one who has rendered certain prescribed military service, and who has already entered less than one hundred and sixty acres *shall be entitled* to exercise this additional right. These are the qualifications prescribed by law.

But, under appellants construction, there would have to be read into the statute, in addition to the above, "and every person who, in good faith tenders a soldier's additional right, believing it to be valid and genuine, shall, in case the right is held to be invalid, be entitled to an additional grant of time, within which to substitute valid scrip."

What authority has the Department to add this additional provision to the law?

It is true of course that if a party applies to enter land with invalid scrip, he may make another application for the same land, with valid scrip, at any time after the invalid scrip has been rejected, provided, that no other valid, adverse rights have attached in the meantime.

In the case at bar, however, as we have seen, the Santa Fe Railway Company had filed its ap-

plication for the land more than six weeks prior to the time that Robinson applied for leave to substitute valid scrip, and this application of the company had been received and noted on the records as subject to the application of Robinson, under the James Carroll scrip. (Complainants Ex. 1, Record, p. 30).

In the cases of John C. Ferguson, *supra,* Charles P. Maginnis, *supra,* and J. E. C. Robinson, *supra,* the rights of the respective parties, in such a situation as this, were clearly defined.

In those cases it was distinctly decided that, where a party applied to enter public land, under an uncertified soldier's additional right, that the application did not constitute an *entry,* that it did not *segregate* the land applied for, but that it should be noted on the records merely as an *application,* and that the local officers should take no further action thereon, until the application had been examined as to its validity by the General Land Office and approved or rejected.

It was further held, in these cases, that the application, under the soldier's additional right, did not bar subsequent applications for the same land, but that where such subsequent applications were made they should be received and held to await the action of the Department upon the prior soldier's additional application, and that in case the latter was approved then the subsequent application should be rejected, and, in case the soldier's additional right was held to be invalid, then the subsequent application should be given the preference right of entry.

As Robinson's application for the land under the Carroll scrip had been rejected, and as the railway company had a valid application for the land, under the law, pending at the time of the rejection of Robinson's application, the company's right to the land became a preferred one and could not be wiped out by allowing Robinson time within which to exercise a new, independent and subsequent right.

The underlying principle of our entire public land system is that the public domain belongs to all of the people alike, and that their right to take it depends upon priority of application, and as the railway company's application was prior to that of Robinson, under the Justus F. Heath right, the land was properly granted to the company.

The appellants nowhere in their brief deny that the application of the railway company was a valid one, that it was pending at the time Robinson applied to enter the land under the Heath right, but they contend that the application under the Heath right was a continuance of, or substitution for, the Carroll right, and as the application, under the Carroll right, was prior to that of the railway company, that, therefore, Robinson was entitled to the land.

The fallacy of appellants' position lies in the assumption that the application under the Heath right, was a continuation of, or was, or could be, a substitution for the Carroll right, so as to interfere with, or adversely affect, a valid application, pending at the time of the so-called substitution.

The application, under the Heath right, was the exercise of a new and independent right.

The Heath right had no relation to, or connection with, the Carroll right. Both were entirely separate and distinct.

The Department found, and the appellants admit, that the Carroll right was void *ab initio*. In other words, it never was a right at all. How, therefore, could the application, under the valid Heath right, vitalize, or give validity to, the Carroll right, which was void from the beginning.

But, in order for the appellants to prevail, it *must* be held that there was some virtue in the Carroll right, and that Robinson gained some rights by his application under it, for, otherwise, he must rest his right to the land entirely upon the application under the Heath right, and to hold that he could take the land under this right alone, would be equivalent to holding that a subsequent application could wipe out a prior, valid application, and this would be a denial of the fundamental principle underlying the administration of the public land laws.

At the time Robinson made his original application he relied upon the Carroll right *alone*. When that right failed he could not come in with a so-called substituted right so as to gain priority over a valid, adverse right then pending.

We submit that the Department was entirely within the bounds of reason and of the law when it said, in reference to his application to substitute, as follows: "It is not denied that the application of the Railroad Company was filed prior to the attempted substitution, nor that its accept-

ance by the local officers, when presented, was in conformity with the settled practice, obtaining in such cases. This practice as was pointed out in the departmental decision in the case of Frederick L. Gilbert et al, (35 L. D.) arises of necessity, because of want of authority of the local officers to pass upon or allow or reject an application of this character, when presented. Robinson cannot escape the consequences growing out of his request to substitute a valid right for an invalid right. The granting thereof was, in effect, a final determination of his rights under the original application and he is charged with notice of what the record contained at the time such request was made. At that date the application of the railroad company was a matter of record and any rights of Robinson initiated subsequent thereto were subject to those of the railway company under its application." (Record, p. 19).

And again: "the simple statement of the facts destroys all the argument in support of such practice. Had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented. But such is not the case, as he was relying solely upon the rights obtained by assignment, and of these the first one was worthless and, prior to the assertion of the second, the right of another had attached. The arbitrary destruction of this intervening right in the manner contended for by counsel would be wholly unwarranted." (Record, p. 22).

If Robinson had, in the first instance, filed a valid right, and there was simply some defect, or irregularity, which needed to be cured, it might

be urged with reason that such defect, or irregularity, could be cured, or amended, without destroying the effect of the application.

But such is not the case here. The original right tendered by Robinson was not merely defective, or irregular, it was absolutely void, and could not be cured; and the right tendered in lieu of it was not amendatory of a defective right, but the assertion of a new, separate and independent right.

The Department has always permitted the substitution of valid for invalid rights, and has allowed defects and irregularities in entries to be made, but always upon the condition that they did not conflict with adverse rights already pending.

The law declares that one must be a citizen, or have declared his intention, to enable him to make a preemption filing. But in the case of Jacob H. Edens, 7 L. D., 229, the claimant made his settlement while he was an alien. Notwithstanding this fact, Secretary Vilas held that his entry should be allowed because it appeared that he had afterwards declared his intention *before any adverse claims had attached.*

The same doctrine is also laid down in the following cases:

Kelly vs. Quast, 2 L. D., 627.
Mann vs. Huk, 3 L. D., 452.

In the case of Kelly vs. Quast, *supra,* the Secretary says: "Quast failed to protect himself by making proper settlement prior to filing; *but in the absence of an intervening adverse claim,* the

Government will not interpose any objection to his entry."

In Mann vs. Huk, *supra,* the Secretary says: "It is the settled ruling of this Department that where a defect of this sort exists it may be cured by fulfilling the requirements of law *at any time prior to the intervention of an adverse claim."*

Now if a defective preemption filing cannot be cured where it would conflict with an adverse claim, upon what principle of law could the substitution of a valid soldier's additional right for an invalid one be permitted, where the substitution would operate to the disadvantage of an intervening adverse right."

It is also held in the cases of Ayers vs. Bowber, 15 L. D., 550, and Bayley vs. Mitchell, 19 L. D., 419, that a homestead entry, cancelled for failure to submit final proof within the proper time, could not be reinstated, *in the presence of an intervening adverse right.*

In considering the construction to be given to a statute, it is always proper to take into consideration the results that will be produced by any given interpretation that is contended for.

We maintain that the right to substitute valid for invalid soldier's additional scrip, where it would conflict with adverse rights, would produce absurd, ridiculous and inequitable results, and that the courts will never adopt such an interpretation, where it is possible to avoid it.

If the right of substitution contended for by appellants should be allowed, it would permit designing persons to deliberately withdraw large

tracts of the public domain from market, by filing applications therefor with invalid, or even forged, soldier's additional rights, with the *object* of withholding them from other entries, until such time as the applicants could obtain valid scrip with which to make their entries.

It is well known that there have been thousands of forged additional homestead rights tendered. Under appellants theory large tracts of desirable lands could be applied for with these forged rights, and held with perfect safety, for, when in the course of investigation, the right was declared to be invalid, all the applicant would have to do would be to apply for time within which to substitute valid scrip, and this without any danger of losing the land, for the substituted right would protect him against any prior applications.

On the other hand, under the practice adopted by the Department, the holder of soldier's additional rights, whether valid, or invalid, may apply for land and obtain a *preference* right thereto, but may not withdraw it from the market.

If the soldier's additional right is held to be valid, the applicant gets the land. If it is held to be invalid then the next applicant gets the land.

By this method the public domain is at all times held open *to the first legal applicant*, and all parties are treated on terms of equality.

Again, if the department can practically withdraw land and hold it for an applicant, until he can get out and hunt up valid scrip with which to take the land, how long a time can be given to make the substitution?

There is no statute limiting the time, and if thirty days can be granted, why not sixty?

Furthermore, if one who located invalid scrip through an honest mistake can be given additional time within which to obtain valid scrip, why, on principle, should he not also be given additional time if he makes another mistake and locates invalid scrip when he comes to make his substitution, and so on indefinitely?

As the Secretary said in the Robinson case, the arguments advanced for the right of substition, in such cases, are clearly untenable.

Finally, we contend that a legislative construction has been given on this right of substitution, where it conflicts with an adverse right, by an Act of Congress.

This law will be found in the 27 Stat. L. 593, and in Fed. Stats. Ann. Vol. 6, page 327, and is as follows:—"That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, *and there is no adverse claimant,* and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the Government price for the land."

It will be noticed that this law applies to soldier's additional rights that have been examined and certified to by the Department.

But, even in such cases, the statute provides that in case there is any defect in the scrip it cannot be cured and the applicant allowed the land taken under it, *where there is an adverse claimant.*

Now, if Congress deliberately provided that, where soldier's additional scrip, which had been certified as valid by the Government, had been located on land, and the scrip turned out to be invalid, that, in such cases, the defect could not be cured and the applicant allowed to take the land, in case there was an adverse claimant, upon what theory can it be claimed that Congress, which is the body that creates all rights in regard to public lands, intended that such right should be granted to the applicant under uncertified scrip?

Judge Sanborn, in his dissenting opinion on page 95 of the record, in reply to our contention that the Department had no power to grant additional time to substitute valid for invalid scrip, says:

> "The suggestion is made that the officers of the Land Department had no power to establish the rule and practice of giving to an applicant a short time after his additional homestead right was found to be defective to provide a valid additional homestead right in lieu of it, or to receive the latter in support of his original application in the face of a junior claim. But ample authority to establish and maintain this rule of practice may be found in Sections 441, 453, and 2306 of the Revised Statutes."

Section 441 provides:

> "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> "The public lands, including mines."

Section 453 provides:

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties, appertaining to the surveying and sale of the public lands of the United States." Section 2306 provides:

"Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

We contend that there is nothing to be found in any of these sections giving the Land Department the power to grant additional time to substitute valid for invalid scrip, when the so-called substitution would conflict with adverse rights, notwithstanding Judge Sanborn's declaration that said sections confer ample authority on the Department to establish and maintain such rule and practice.

It is not denied that the Department has the power to establish rules affecting questions of practice and procedure. But the Department cannot, under the guise of such authority, either enlarge or diminish the rights created by statute.

In Hartman vs. Warren, 76 Fed. Rep., 162, the court says:

"The land department may undoubtedly make reasonable regulations for the conduct of the business instructed to it and the dis-

charge of the duties imposed upon it, provided, always, that they are not inconsistent with the legislation enacted and the policies adopted by congress."

Congress provided that one who holds a valid soldier's additional right might enter public lands therewith. But, under the rule contended for by Judge Sanborn and the appellants, the Department not only has the authority to confer this upon one who holds a valid right, but if the applicant tenders an invalid right, the Department has the power to grant him an additional and indefinite length of time, within which to go into the market and find a valid right with which to take the land, notwithstanding the fact, that at the time he applies for the grant of such additional time, another legal application is pending for the same land.

This is not *administering* the law, it is *making* the law; it is not the establishment of a rule of procedure or practice, it is the creation of an additional right, not contemplated by statute.

In every public land law that has ever been passed, Congress itself has provided, and has not left to the Land Department to prescribe, the qualifications that an applicant must possess, in order to enable him to enter public lands; and these qualifications must exist *at the time the application for the land is made.*

The old preemption act provided that every person who is the head of a family and a citizen of the United States, or who had declared his intention to become such, might enter one hundred and sixty acres of land.

Would anyone contend that the Department, under the preemption act, had the power to grant additional time to one to perfect his naturalization, where it had been discovered after his application had been received that he was not a citizen, in the face of a valid adverse right pending at the time the application for additional time was made?

Or, would anyone contend that one who did not possess the qualifications prescribed by the homestead act, could be given an additional grant of time by the Department to cure the defect, in the face of a valid adverse right pending at the time the additional grant of time was applied for?

If the Department has no power to grant additional time to preemptors or homesteaders to cure defects in their original applications, where such grant of time would conflict with other adverse rights, certainly there is no rule of reason, logic, or common sense that would confer any such authority upon the Department, in the case of one who had applied to enter public land with soldiers additional scrip, which was void *ab initio*.

Judge Sanborn, in his dissenting opinion, also contended that there was an established custom in the Department permitting one, who had made an application for land with an invalid Solder's additional right, to a grant of additional time, within which to substitute a valid right, and in support of this position he cites the decision of the Commissioner of the General Land Office, in the case of Charles P. Maginnis, rendered on July 19, 1905.

But the learned Judge overlooked the fact, or forgot to state it in his dissenting opinion, that

Thos. Ryan, as acting Secretary, overruled the decision of the Commissioner, that Secretary Hitchcock, on a motion for review, sustained the acting Secretary, and that Thos. Ryan, as acting Secretary, on a motion for re-review, adhered to the ruling made in the two former decisions made by the Secretary. See Record, pp. 53-60.

How a custom in the Department could be established by a decision made by the Commissioner of the General Land Office, when the decision of the latter officer was promptly overruled on three different occasions by the Secretary of the Interior, we are unable to comprehend.

In closing, we desire to call the court's attention to the case of Moss vs. Dowman, 176 U. S., 413, which contains many points of similarity to the case at bar.

In this latter case one, Doran, had made a homestead entry on a tract of land located in Cook County, Minnesota. While the entry was still in full force and effect, the appellant, Moss, purchased Doran's relinquishment for the sum of $1,000.00 and filed both the relinquishment and a homestead entry by herself, in the Duluth Land Office, at the same instant of time. Several weeks prior to the time that Moss purchased the relinquishment of Doran's homestead entry, the appellee, Dowman, settled on the land. Shortly after the relinquishment was filed the appellee, Dowman, applied to enter the land under the homestead act, and a contest arose between Moss and Dowman as to which one had the prior right to the land. The Department upheld Dowman's contention and it was upheld by this court in the case cited above.

In the Moss case, Dowman settled on the land while it was still covered by Doran's homestead entry, and, consequently, any rights that he might obtain, by his s[illegible]nent, were subject to the final disposition of D[illegible]ran's entry.

In the case at bar, the Railway Company made application for the land subsequent to the time that the appellant Robinson applied to enter it, and, consequently, the Railway Company's right to the land was subject to the final disposition of Robinson's application.

In the Moss case, both the Department and the Courts held that the moment Doran's relinquishment was filed Dowman's right to the land attached, he being the next legal applicant.

In the case at bar, both the Department and the courts have held, that the moment Robinson's application, under the Carroll right, was annulled, that the Railway Company's application attached, as being the next legal applicant.

In the Moss case, the appellant Moss sought to tack her own, independent homestead entry on to the homestead entry of Doran, so as to cut off the intervening, *adverse right* established by the settlement of Dowman.

But the Department and the courts held that, as the rights of Doran and the rights of Moss to the land were separate, distinct and independent rights, and as Dowman was a settler on the land at the time Doran's relinquishment was filed, that his right was prior, in point of time, to Moss' homestead entry.

In the case at bar, the appellant Robinson seeks to tack on his application, under the valid

Heath right, to the invalid Carroll right, so as to cut out the application of the Railway Company, pending at the time the Carroll right was declared to be void.

But both the Department and the courts have declared that the Carroll right and the Heath right were separate, distinct and independent rights, and that as the Railway Company had a valid, legal application pending for the land at the time the Carroll right was declared to be invalid, that the right of the Railway Company was prior, in point of time, to the application of Robinson under the Heath right.

In the Moss case, the appellant Moss pleaded that the entryman, Doran, appeared by the records to be the owner of the homestead entry on the land in question; that, under the law, she had a right to purchase his relinquishment, and that she did purchase it in *good faith* and paid $1000.00 in cash therefor, and on account of her good faith in the transaction, which was not denied, she ought to be protected and allowed to perfect her entry as against the claims of Dowman.

But the answer of the Department and the courts to her plea was, that the entry of public lands does not depend upon *good faith,* but upon *qualifications* prescribed by law, and upon priority of application for the land sought to be entered.

Likewise, in the case at bar. the appellant Robinson urged that he bought the Carroll scrip in *good faith,* that he did not know that it was not genuine, and that he ought, therefore, to be granted additional time within which to obtain valid scrip as a substitute for the forged Carroll

scrip, and that pending his search for valid scrip the land should be held open for him, even as against the prior, valid application of the Railway Company.

But both the Department, and the courts, up to the present time, have answered him as they did the appellant in the Moss case, that the right to enter public land does not depend upon *good faith*, but upon *qualifications* prescribed by law, and that one of the conditions prescribed by law is that no one is entitled to enter public land, if at the time he applies to enter, the application of some other applicant for the land is pending. In other words, the public domain is open to all alike, and the law is, and always has been, administered, upon the principle that the *first* legal applicant is entitled to take the land, and that this right to take the land must be based upon a right *existing in the applicant at the time he applies to enter, and cannot be tacked on to some other distinct and independent right.*

We contend, therefore, first, that the appellant has not shown that there was a rule and practice in the Department that one who tendered an invalid Soldier's additional right was entitled to an additional grant of time, within which to substitute a valid right.

We contend, second, that even if such a custom had been shown that it was beyond the power of the Department to establish it, for it would be prescribing, not merely a rule of practice, or procedure, but an additional qualification not prescribed by statute.

For the foregoing reasons we respectfully submit that the decisions of the Circuit Court and the Circuit Court of Appeals should be affirmed.

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